

DATO' SERI ANWAR IBRAHIM

A

v.

PP

COURT OF APPEAL, PUTRAJAYA

B

AZIAH ALI JCA

ROHANA YUSUF JCA

MOHD ZAWAWI SALLEH JCA

[CRIMINAL APPEAL NO: W-05-19-01-2012]

21 FEBRUARY 2014

C

CRIMINAL PROCEDURE: *Trial - Recall of witnesses - Whether sought to adduce additional evidence not available during trial - Whether motion satisfied cumulative requirements enunciated in R v. Parks - Whether sought to reopen facts or issues already litigated - Whether application within contemplation of s. 61 Courts of Judicature Act 1964 - Whether motion identified with precision the intended evidence desired to be obtained*

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EVIDENCE: *Witness - Recalling of - Whether sought to adduce additional evidence not available during trial - Whether decision of trial judge in another proceeding relevant to present motion - Whether decision admissible for purpose of proving truth in appeal*

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The applicant was charged and subsequently acquitted and discharged for an offence under s. 377B of the Penal Code ('second sodomy trial'). There was an appeal pending against the said order. By a notice of motion in encl. 62a, the applicant sought leave pursuant to s. 61 of the Courts of Judicature Act 1964 ('CJA') to recall SP25, Judy Blacious s/o AF Pereira, in relation to the rejection of the petition of SP25 to be admitted as an advocate and solicitor by Her Ladyship Zaleha Yusof J on the ground that he was not a fit and proper person by reason of the finding made in a Suhakam Report. The applicant argued that Zaleha Yusof J's decision was significant and pertinent because it would reflect adversely and negatively on the credibility of SP25 who was an important witness in the second sodomy trial. In opposing encl. 62a, the respondent contended that (i) the motion failed to meet the cumulative requirements expounded in the case of *R v. Parks* for leave to be granted under s. 61 of the CJA; and (ii) encl. 62a did not seek to adduce additional evidence which was not available during the trial, but instead sought to reopen facts or issues already litigated at the second sodomy trial and this was not within the contemplation of s. 61 of the CJA.

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A Held (dismissing motion)

Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

- B** (1) Public policy demands that the principle of finality in litigation should be preserved. The appellate court should not travel outside the record of the lower court and not take evidence in appeal. Consequently, additional or fresh evidence may only be admitted in exceptional circumstances where such evidence is essential to the just decision of the case. (para 12)
- C** (2) Enclosure 62a had failed to meet the four cumulative requirements enunciated in *R v. Parks* for the court to exercise the discretion under s. 61 of the CJA. The requirements were:
- D** (i) the evidence sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issue; (iii) it must be credible evidence in the sense of being well capable of belief; and (iv) the court will, after considering the evidence, go on to consider whether there might have been reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given
- E** together with the other evidence at the trial. (paras 13 & 15)
- (3) It was plain and clear that the Suhakam Report was evidence already available to the applicant at the second sodomy trial. Zaleha Yusof J's decision was based entirely on the Suhakam
- F** Report which was the determinative factor in the decision. It was also referred to and marked as IDD in the second sodomy trial. (para 15)
- (4) By virtue of s. 43 of the Evidence Act 1950, Zaleha Yusof J's
- G** decision was inadmissible for the purpose of proving the truth in the hearing of the applicant's appeal. A judgment is conclusive only in respect of the legal state of affairs affected but not the facts upon which it is based. SP25's credibility had been vigorously challenged during the second sodomy trial
- H** based on the Suhakam's report. Hence, Zaleha Yusof J's decision was also irrelevant to the present motion. As the applicant had failed to satisfy two of the four cumulative conditions for the court to invoke s. 61 of the CJA, there was no necessity to deal with other requirements. (paras 16, 17,
- I** 18 & 20)

- (5) In deciding whether the prosecution had succeeded in establishing a *prima facie* case in the second sodomy trial, the judge did not rely solely on the evidence of SP25 but also on the evidence of the complainant, the chemists and medical officer. Enclosure 62a was also barren of specific reference to what finding of fact made by the trial judge in the second sodomy trial intended to be controverted by the evidence sought to be adduced in this motion. (paras 21 & 22) A B
- (6) Section 61 of the CJA does not permit a party to simply request a particular witness to be recalled to further testify at the appellate stage without the party providing to court the precise nature of the intended or proffered evidence sought to be admitted. The motion failed to clearly identify with precision the intended evidence which was desired to be obtained in recalling SP25. (paras 22 & 23) C D

Bahasa Malaysia Translation Of Headnotes

Pemohon dituduh dan kemudiannya dilepaskan dan dibebaskan bagi kesalahan di bawah s. 377B Kanun Keseksaan ('perbicaraan liwat kedua'). Terdapat rayuan yang menunggu perbicaraan terhadap perintah tersebut. Melalui notis usul dalam lampiran 62a, pemohon memohon kebenaran di bawah s. 61 Akta Mahkamah Kehakiman 1964 ('AMK') untuk memanggil semula SP25, Judy Blacious a/l AF Pereira, berkaitan dengan penolakan petisyen SP25 untuk diterima masuk sebagai peguamcara dan peguambela oleh Yang Arif Hakim Zaleha Yusof atas alasan bahawa dia seorang yang tidak layak berdasarkan dapatan yang dibuat dalam satu Laporan Suhakam. Pemohon menghujahkan bahawa keputusan Zaleha Yusof H adalah penting dan berkaitan kerana ia akan menggambarkan secara bertentangan dan negatif terhadap kebolehpercayaan SP25 yang adalah saksi penting dalam perbicaraan liwat kedua. Dalam membantah lampiran 62a, responden menghujahkan bahawa (i) usul tersebut gagal mematuhi keperluan kumulatif yang dihuraikan dalam kes *R v. Parks* untuk kebenaran diberikan di bawah s. 61 AMK; dan (ii) lampiran 62a bukan untuk mengemukakan keterangan tambahan yang tidak ada semasa perbicaraan tersebut, tetapi sebaliknya adalah untuk membuka semula fakta atau isu-isu yang telah diperbincangkan dalam perbicaraan liwat kedua dan ini bukan dalam pertimbangan s. 61 AMK. E F G H I

A Diputuskan (menolak usul)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

- B** (1) Polisi awam menuntut supaya prinsip kemuktamadan litigasi wajar dilindungi. Mahkamah rayuan tidak boleh melangkah keluar dari rekod mahkamah rendah dan tidak boleh menerima keterangan dalam rayuan. Dengan itu, keterangan tambahan atau baru hanya boleh diterima dalam hal keadaan yang terkecuali di mana keterangan tersebut penting bagi keputusan adil dan saksama kes tersebut.
- C**
- D** (2) Lampiran 62a telah gagal mematuhi empat keperluan kumulatif yang diuraikan dalam *R v. Parks* bagi mahkamah melaksanakan budi bicaranya di bawah s. 61 AMK. Keperluan-keperluan tersebut adalah (i) keterangan yang hendak dipanggil adalah keterangan yang tidak ada semasa perbicaraan; (ii) keterangan tersebut mesti relevan kepada isu; (iii) ia mesti keterangan yang boleh dipercayai di mana ia perlu boleh dipercayai; (iv) mahkamah akan, selepas mempertimbangkan keterangan, meneruskan untuk mempertimbangkan sama ada terdapat keraguan munasabah dalam minda juri berkaitan dengan kebersalahan perayu jika keterangan itu telah diberikan bersama-sama dengan keterangan lain dalam perbicaraan.
- E**
- F** (3) Adalah jelas bahawa Laporan Suhakam merupakan keterangan yang telah sedia ada bagi pemohon dalam perbicaraan liwat kedua. Keputusan Zaleha Yusof H adalah berdasarkan secara keseluruhannya atas Laporan Suhakam yang merupakan faktor penentu dalam keputusan tersebut. Ia juga telah dirujuk dan ditandakan sebagai ekshibit dalam perbicaraan liwat kedua.
- G**
- H** (4) Berikutan s. 43 Akta Keterangan 1950 keputusan Zaleha Yusof H tidak boleh diterima bagi tujuan pembuktian kebenaran dalam perbicaraan rayuan pemohon. Sesuatu penghakiman muktamad hanya apabila ia berkaitan dengan urusan undang-undang yang terjejas dan bukan fakta terhadap mana ia diasaskan. Kebolehpercayaan SP25 telah dicabar semasa perbicaraan liwat kedua berdasarkan Laporan Suhakam. Oleh itu, keputusan Zaleha Yusof H juga tidak relevan kepada usul ini. Oleh sebab pemohon telah gagal memenuhi dua daripada empat syarat kumulatif untuk mahkamah membangkitkan s. 61 AMK, tidak ada keperluan untuk mempertimbangkan keperluan-keperluan lain.
- I**

- (5) Dalam menentukan sama ada pihak pendakwaan telah berjaya membuktikan kes *prima facie* dalam perbicaraan liwat kedua, hakim tidak menyandar semata-mata atas keterangan SP25 malah atas keterangan pengadu, ahli-ahli kimia dan pegawai perubatan. Lampiran 62a juga tidak mengandungi rujukan spesifik kepada penemuan fakta yang dibuat oleh hakim bicara dalam perbicaraan liwat kedua yang diniatkan untuk disangkal oleh keterangan yang hendak dikemukakan dalam usul ini. A
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- (6) Seksyen 61 AMK tidak membenarkan sesuatu pihak untuk semata-mata meminta saksi tertentu untuk dipanggil untuk memberikan keterangan lanjut di peringkat rayuan tanpa pihak tersebut memberikan kepada mahkamah sifat sebenar keterangan yang diniatkan atau dikemukakan untuk penerimaan. Usul tersebut telah jelas gagal mengenalpasti dengan terperinci keterangan yang diniatkan yang hendak diperolehi dengan memanggil semula SP25. C
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Case(s) referred to:

- Brown v. The Queen* [1993] 16 CRR (2nd) 290 (SC) (*refd*)
Che Din Ahmad v. PP [1975] 1 LNS 7 HC (*refd*)
D'Orta-Ekenaike v. Victoria Legal Aid [2005] HCA 12 (*refd*) E
Leng Lan v. SM Yesudian [1937] 1 LNS 32 HC (*refd*)
Mulholland v. Mitchell [1971] 1 All ER 307 (*refd*)
Murugayah v. PP [2004] 1 LNS 109 CA (*refd*)
Phung Geok Hoay lwn. PP [2012] 1 LNS 805 CA (*refd*)
R v. Parks [1961] 3 All ER 633 (*refd*) F
R v. Pendleton [2002] 1 WLR 72 (*refd*)
Re Uddin [2005] 3 All ER 550 (CA) (*refd*)
Taylor v. Lawrence [2002] 2 All ER 353 (CA) (*refd*)
The Ampthill Peerage Case [1976] 2 All ER 411 (HL) (*refd*)

Legislation referred to:

- Courts of Judicature Act 1964, s. 61(1) G
 Evidence Act 1950, s. 43
 Penal Code, s. 377B

Other source(s) referred to:

- Sarkar, *Evidence*, 15th edn, vol 1, p 839, para 2 H
- For the applicant* - Karpal Singh (Ram Karpal Singh, Sangeet Kaur Deo & Zaleha Al-Hayat with him); Karpal Singh & Co
For the respondent - Muhammad Shafee Md Abdullah (Mohamad Hanafiah Zakaria & Noorin Badaruddin with him); AG's Chambers I
- [Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-9-2009]
 Reported by S Barathi

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JUDGMENT
(Enclosure 62a)

Mohd Zawawi Salleh JCA:

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Introduction

[1] Dato' Seri Anwar bin Ibrahim ("applicant") by notice of motion dated 4 February 2014 in encl. 62a supported by his affidavit affirmed on the same date in encl. 62b is seeking for the following orders:

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(1) The applicant be granted leave pursuant to section 61 of the Courts of Judicature Act, 1964 to recall SP25, Judy Blacious s/o A F Pereira, Investigating Officer in High Court, Kuala Lumpur (Perbicaraan Jenayah No: 45-9-2009 *Pendakwa Raya lwn Dato' Seri Anwar Ibrahim*) in relation to the rejection of the Petition for admission to the Bar of the High Court in Malaya (Petition No. 18-730-07/2012) on the application of SP25 by the High Court, Kuala Lumpur by Y.A. Dato' Zaleha binti Yusof on 10th January 2014 on the ground that SP25 is not a fit and proper person to be admitted to the Bar of the High Court in SUHAKAM (Report Of SUHAKAM Public Inquiry Into The Arrest And Detention Of Five Lawyers Of The Kuala Lumpur Legal Aid Center On 7 May, 2009.

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(2) Any further or other order deemed fit and proper by this Honourable Court.

[2] A brief advertence to the factual antecedents of the case is necessary to put the notice of motion in its proper perspective.

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[3] The applicant was charged in Kuala Lumpur High Court Criminal Trial No: 45-9-2009 for committing carnal intercourse against the order of nature to one Mohd Saiful Bukhari bin Azlan, an offence punishable under s. 377B of the Penal Code ("the second sodomy trial"). At the end of the trial, the applicant was acquitted and discharged. Dissatisfied by the said order of acquittal and discharge, the Public Prosecutor lodged an appeal to the Court of Appeal. The appeal is still pending before the Court of Appeal.

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[4] The motion for leave to recall SP25 (Encik Judy Blacious s/o A F Pereira) is solely predicated on the decision of the High Court Judge YA Dato' Zaleha binti Yusof (Zaleha Yusof's

decision) in rejecting the petition of SP25 to be admitted as an advocate and solicitors on 10 January 2014. SP25 was found not a fit and proper person by reason of the finding made by SUHAKAM against him in the report of SUHAKAM Public Inquiry Into The Arrest And Detention Of Five Lawyers Of The Kuala Lumpur Legal Aid Centre on 7 May 2009 (the SUHAKAM report). The applicant argues that Zaleha Yusof's decision is significant and pertinent because it would reflect adversely and negatively on the credibility of SP25 who was an important witness in the second sodomy trial. Accordingly, learned counsel argued that had Zaleha Yusof's decision been available at the trial, the learned judge would have in all probabilities ruled that the evidence of SP25 was unreliable, unworthy of belief and ought to have been rejected. In all likelihood, the learned judge would have ruled that the prosecution had failed to make out a *prima facie* case.

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[5] The respondent vehemently opposes encl. 62a, contending that the motion fails to meet the cumulative requirements expounded in the case of *R v. Parks* [1961] 3 All ER 633 for leave to be granted under s. 61 of the Courts of Judicature Act 1964 ('CJA'). Furthermore, it was contended that encl. 62a does not seek to adduce additional evidence which was not available during the trial, but instead it seeks to reopen facts or issues already litigated at the second sodomy trial. According to the respondent, this is not within the contemplation of s. 61 of the CJA.

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[6] The respondent expresses concerns that the notice of motion would result in further delay in disposing the appeal.

Scope Of S. 61 Of CJA

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[7] The law pertaining to adducing additional evidence in an appeal is not controversial, and is guided by s. 61 of CJA which states in the following terms:

61. Additional evidence.

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(1) In dealing with any appeal in a criminal case the Court of Appeal may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the trial court.

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A (2) When the additional evidence is taken by the trial court, it shall certify the evidence, with a statement of its opinion on the case considered with regard to the additional evidence, to the Court of Appeal, and the Court of Appeal shall thereupon proceed to dispose of the appeal.

B (3) The parties to the appeal shall be present when additional evidence is taken.

C (4) In dealing with any appeal in a criminal case the Court of Appeal may also, if it thinks fit, call for and receive from the trial court a report of any matter connected with the trial.

D [8] A plain reading of s. 61(1) of the CJA reveals that wide powers have been invested with the Court of Appeal to receive additional evidence. All that is required to be satisfied is that the additional evidence is necessary. (See *Phung Geok Hoay lwn. PP* [2012] 1 LNS 805; [2013] 3 MLJ 728). However, it is pertinent to note this section should be invoked as an exception more than a rule. This is because an appeal must be decided on the evidence which was before the trial court. An exceptional power such as this, must be exercised judiciously and not capriciously or arbitrarily having regards to the justice of the case. Any improper or capricious exercise of such power may lead to undesirable result.

F [9] The underlying reason why additional or fresh evidence is generally not allowed on appeal is simple. A litigation must come to an end as a matter of public policy - *interest reipublicae ut sit finis litium* (it is in the interest of the society as a whole that there be an end to litigation). In *Leng Lan v. SM Yesudian* [1937] 1 LNS 32; [1939] MLJ Rep. 222, Aitken J remarked that "the courts are very unwilling to allow (a completed case) to be reopened for the purpose of hearing new evidence except for good and substantial cause."

H [10] There is a long list of authority in major common law jurisdictions in support of this public policy. Lord Wilberforce in *The Ampthill Peerage Case* [1976] 2 All ER 411 (HL) at pp. 417h to 418c said that limits must be placed on citizens to open and reopen disputes. The same point was made by the Court of Appeal in *Taylor v. Lawrence* [2002] 2 All ER 353 (CA) and further reaffirmed by the Court of Appeal in *Re Uddin* [2005]

3 All ER 550 (CA). Similar voice was echoed in the Canadian case of *Brown v. The Queen* [1993] 16 CRR (2nd) 290 (SC) at pp. 293 - 294, in her dissenting judgment, L'Heureux-Dubé J explained the general principle of finality as follows, in relation to the raising of new arguments on appeal:

... the general prohibition against new arguments on appeal supports the overarching societal interest in the finality of litigation in criminal matters. Were there to be no limits on the issues that may be raised on appeal, such finality would become an illusion. Both the Crown and the defence would face uncertainty, as counsel for both sides, having discovered that the strategy adopted at trial did not result in the desired or expected verdict, devised new approaches. Costs would escalate and the resolution of criminal matters could be spread out over years in the most routine cases. Moreover, society's expectation that criminal matters will be disposed of fairly and fully at the first instance and its respect for the administration of justice would be undermined. Juries would rightfully be uncertain if they were fulfilling an important societal function or merely wasting their time. For these reasons, courts have always adhered closely to the rule that such tactics will not be permitted.

[11] In *D'Orta-Ekenaike v. Victoria Legal Aid* [2005] HCA 12, the High Court of Australia explained the general principle of finality of which the prohibition on adducing additional evidence on appeal forms a part:

A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of *res judicata* and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.

The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature and availability of appeals, rules about what points may be taken on appeal and rules

- A about when further evidence may be called in an appeal (in particular, the so-called “fresh evidence rule”) are all rules based on the need for finality.

B [12] In sum, we can safely conclude that public policy demands that the principle of finality in litigation should be preserved. The appellate court should not travel outside the record of the lower court and not take evidence in appeal. Consequently, additional or fresh evidence may only be admitted in exceptional circumstances where such evidence is essential to the just decision of the case.

C **Conditions To Justify Reception Of Additional Evidence**

- D [13] The principles on which a Court of Appeal is allowed to receive additional evidence were enunciated in the case of *R v. Parks* [1961] 3 All ER 633 which was later approved by the House of Lords in the case of *R v. Pendleton* [2002] 1 WLR 72. These principles were also applied in the Malaysian case of *Murugayah v. PP* [2004] 1 LNS 109; [2004] 2 MLJ 545. In the case of *Che Din Ahmad v. PP* [1975] 1 LNS 7; [1976] 1 MLJ 289, Syed Agil Barakbah (as he then was) had this to say on the four requirements adumbrated in *R v. Parks* (*supra*):

F In considering such application the appellate court has always adopted the attitude that it is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the Court is ever willing to listen to additional evidence. (*Mohamed bin Jamal v. PP* [1964] MLJ 254, 255, per Thomson LP, quoting Hallet J in the case of *R v. Jordan* [1956] 40 Cr App R 152, 154). It is clear, therefore that not only the circumstances must be most exceptional but the subject which is proposed to be adduced by further evidence is subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of trial. The matter is left entirely to the discretion of the Court. The principles which the Courts have decided in the course of years may be summarised according to the passage from the judgment or Lord Parker CJ in the case of *R v. Parks* [1961] 2 All ER 633, 634:

- H (i) the evidence sought to be called must be evidence which was not available at the trial;
- I (ii) the evidence must be relevant to the issues;

- (iii) it must be credible evidence in the sense of being well capable of belief; and A
- (iv) the Court will, after considering the evidence, go on to consider whether there might have been reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. B

[14] Reverting to the motion before us, for the reasons that follow we agree with the submissions of the learned Deputy Public Prosecutor that there is no merit in the grounds supporting the motion in encl. 62a. C

Failure To Comply With The Cumulative Conditions: Report Already Available

[15] First, we find encl. 62a fails to meet the four cumulative requirements enunciated in *R v. Parks* for this court to exercise our discretion under s. 61 of the CJA. This is because it is plain and clear that the SUHAKAM Report is evidence already available to the applicant at the second sodomy trial. D

Zaleha Yusof's decision is based entirely on the SUHAKAM Report which finds that "DSP Jude Pereira either consciously were not telling the truth or suffered from a serious bout of loss of memory". The SUHAKAM report was the determinative factor in Zaleha Yusof's decision. It is not in dispute that the SUHAKAM Report was already available on 23 April 2010. That aside, it was also referred and marked as IDD in the second sodomy trial. E

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Decision On Petition Is Irrelevant

[16] We find Zaleha Yusof's decision is irrelevant to this motion for two reasons. Firstly, it is irrelevant by virtue of s. 43 of the Evidence Act 1950. It is pertinent to note that Zaleha Yusof's decision is inadmissible for the purpose of proving the truth in the hearing of the applicant's appeal. A judgment is conclusive only in respect of the legal state of affairs affected but not the facts upon which it is based. The object of s. 43 is explained by Sarkar on *Evidence* (15th Ed), Vol 1 at p. 839, para. 2 as follows: G

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The object of enacting Section 43 is of two fold: (1) to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties in another case; and (2) to maintain the independence of courts by preventing the parties from submitting before the court hearing their case the judgments of other courts. I

A Again at p. 932 he said:

The judgment merely establishes the fact that there has been a judgment but does not prove its correctness.

B [17] Secondly, SP25's credibility has been vigorously challenged during the second sodomy trial based on the SUHAKAM report. In the cross-examination of SP25 in the second sodomy trial, SP25 in fact did not dispute the finding of the SUHAKAM report as clearly shown in at pp. 1886-1888 of the appeal record produced below:

C Encik Karpal Singh:

I'm coming to it, its credibility.

D S: Here is the copy of the findings of the Enquiry. I want you to read it. Have a look at page 34. Boleh baca apa isi kandungan dari baris yang pertama dalam muka surat itu?

E J: We find the evidence of DSP Jude Pereira totally unsatisfactory. DSP Jude Pereira either consciously or not, was not telling the truth or suffered from a serious bout of loss memory. DSP Jude Pereira initially denied interacting with any lawyers until he was confronted with direct evidence and documentary evidence in the form of the video footage. He believed OCPD Wan Bahari did not have any conversation with the five lawyers. Looking at the evidence as a whole, it seems to be very dependent on DSP Jude Pereira for the purpose of interaction with the five lawyers and legal advice on matters of criminal proceedings.

F S: Disebut di sana DSP Jude Pereira either consciously was not telling the truth or suffered from a serious bout of loss of memory. DSP Jude Pereira initially denied interacting with any lawyers until he was confronted with direct evidence and documentary evidence in the form of video footage. Ada keputusan dibuat oleh Enquiry itu bahawa Jude Pereira tidak memberi keterangan yang boleh diterima?

G J: Ini adalah pendapat daripada pihak SUHAKAM.

S: Pendapat daripada siapa?

J: SUHAKAM.

I Mahkamah:

He already agreed that's the decision of SUHAKAM.

Encik Karpal Singh: A

I'm just coming to the end of this part.

S: SUHAKAM is a body set up Parliament? You are aware with that, isn't it?

J: Ya, saya faham. B

Encik Karpal Singh:

We want this report to be marked as an exhibit. We put in the whole report. C

Dato' Yusof:

At this junction, can this be marked as ID.

Encik Karpal Singh: D

It is a certified copy.

Mahkamah:

He's not the maker. What is important to you is the findings. The findings he already read orally. It's already there. He is not the maker, how to put in as exhibit. E

Encik Karpal Singh:

It can be. It's a certified copy of the report. If Yang Arif is satisfied with what he had said, I'll ... F

Mahkamah:

Oral evidence is much better.

Dato' Yusof: G

He had made confession.

Mahkamah:

He read that findings. H

[18] Encik Ram Karpal Singh, learned counsel for the applicant contended that SP25 tampered with the DNA sample exhibit in the second sodomy trial. All the samples that were collected from the complainant (PWI) in the second sodomy trial were put in a plastic bag (P27) and then handed over the SP25 to be handed over to the chemist (PW5) who did DNA testing of the sample. I

- A It was not disputed that SP25 had cut open the heat-sealed (P27) containing the containers with swabs. Since the challenge made was relating to tampering of evidence, it was contended that the credibility of SP25 is of paramount importance. Therefore, learned counsel submitted the evidence intended to be adduced
- B through the recall of SP25 is relevant. This argument, with respect, is devoid of any merit. We note from the appeal records that the credibility of SP25 has been vigorously challenged and the central plank of the challenge was based on the said SUHAKAM report.
- C [19] We were further informed during the submission by learned counsel for the appellant that Zaleha Yusof's decision is also pending disposal at the Court of Appeal.
- D [20] Since we find that the applicant has failed to satisfy two of the four cumulative conditions for this court to invoke s. 61 of the Act, we find no necessity to deal with other requirements.

Prima Facie Case

- E [21] Moreover, in deciding whether the prosecution has succeeded in establishing a *prima facie* case in the second sodomy trial, we note that the learned judge did not rely solely on the evidence of SP25 but also on the evidence of the complainant (PW1), the chemists (PW5) and (PW6) and the medical officer
- F (SP4).
- G [22] We also find encl. 62a is barren of specific reference to what finding of fact made by the learned trial judge in the second sodomy trial intended to be controverted by the evidence sought to be adduced in this motion. The motion also fails to clearly identify with precision the intended evidence which is desired to be obtained in recalling SP25.
- H [23] We are of the view that s. 61 of the CJA does not permit a party to simply request a particular witness be recalled to further testify at the appellate stage without the party providing to court the precise nature of the intended or proffered evidence sought to be admitted.

Conclusion

- I [24] The authorities show quite clearly that while under s. 61 of the CJA, the court is given a general discretion to admit evidence of matters that have occurred since the date of the judgment, that

discretion must be exercised sparingly having regard to the important principle that there should be finality in judgment. In *Mulholland v. Mitchell* [1971] 1 All ER 307, Lord Wilberforce had this to say:

This abbreviated and over-simplified description shows at least what limitations must inherently exist to the Court of Appeal's discretion to admit further evidence. It makes it clear that an impossible situation would arise if evidence were to be admitted of every change which may have taken place since the trial. In the nature of things medical condition will vary from year to year, or month to month; earning prospects may change, prices may rise, or even fall. If the Court of Appeal were to admit evidence of changes of this kind (and it must not be overlooked that a facility given to one side cannot be denied to the other), not only would a mass of appeals involve the hearing of evidence but the Court of Appeal would merely be faced with the same uncertainties as faced the judge, and of which the judge has *ex hypothesi*, already taken account. In other words an appellant's contention that factors such as these have changed since the trial must, in normal cases, be met with the answer that the judge, in his estimate has already taken account of them.

[25] In this instant case, we have given our anxious consideration whether the notice of motion should be granted. In our considered view, the motion to recall SP25 falters at the threshold and must therefore be refused.

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